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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 65

VETERANS OF THE ABRAHAM LINCOLN BRIGADE,

Petitioner,

—v.—

SUBVERSIVE ACTIVITIES CONTROL BOARD,

Respondent.

No. 44

AMERICAN COMMITTEE FOR PROTECTION OF THE FOREIGN BORN,

Petitioner,

—v.—

SUBVERSIVE ACTIVITIES CONTROL BOARD,

Respondent.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus*

The American Civil Liberties Union is a non-profit, non-partisan membership corporation that has been engaged for forty-four years solely in the defense of the Bill of Rights. The Union files this brief, with consent of the parties on file with the Clerk, because it believes the Subversive Activities Control Act, Title I of the Internal Security Act of 1950, stands as a monument of infidelity to the American tradition of political freedom. Its purpose and

effect is to remove from the people their right to judge ideas on their merits and to empower the Government to label ideas as noxious by relying on their source alone.

Moreover, the American Civil Liberties Union believes the Act is unconstitutional. *Amicus* so argued on both occasions that the Act was before this Court in *Communist Party* v. *Subversive Activities Control Board,* 351 U. S. 115 and 367 U. S. 1. The statute, however, was held valid insofar as it required the Communist Party to register as a Communist-action organization. While we disagree with that judgment, we urge here that no matter how the law may deal with the Communist Party, it cannot proscribe other organizations by labeling them Communist-fronts, thus driving them from the marketplace of ideas. Otherwise we lay ourselves open to the same evils from which this oppressive legislation pretends to deliver us.

We join with former President Truman who said in his message to Congress vetoing this Act, that "The application of the registration requirements to so-called Communist-front organizations can be the greatest danger to freedom of speech, press and assembly, since the Alien and Sedition Laws of 1798."

Statement of the Case

Petitioners, after hearings held before the Subversive Activities Control Board, were found to be Communist-front organizations under Section 3(4) of the Subversive Activities Control Act of 1950, 50 U. S. C. §782(4), and were ordered to register pursuant to Section 7(b) of the Act, 50 U. S. C. §786(6). Because this brief is concerned entirely with the constitutionality of the Act on its face, it is unnecessary to repeat the facts which are set forth in the briefs of the parties. The brief does make occasional ref-

erences to the record in the Veterans of the Abraham Lincoln Brigade case, but the law that we urge on the Court applies equally to both petitioners.

If the orders to register are upheld, petitioners and their members will be harshly penalized solely for engaging in activities that, beyond any doubt, are protected by the First Amendment. In addition to the stigmatization imposed by the fact of registration alone, Section 5 of the Act (50 U. S. C. §784) debars members from any non-elective office or employment under the United States, prohibits their employment by labor unions, and prohibits employees of the government or of a privately owned "defense facility" from contributing funds or services to the organization. The organization will be required, pursuant to Section 7 of the Act (50 U. S. C. §786), to file an annual report which is to contain a list of all its officers, an accounting of all moneys received and expended during the preceding year, and a list of all machinery in its possession or control that is capable of being used to produce or publish printed matter or material.

Under Section 10 (50 U. S. C. §789), each registered Communist-front organization is forbidden to transmit in the mails any publication intended to be circulated among two or more persons, unless the publication and its wrapper bear the notice—"Disseminated by ....., a Communist organization." Likewise, no such organization may broadcast any matter over radio or television unless it is announced that "The following program is sponsored by ....., a Communist organization."

Pursuant to Section 11 of the Act (50 U. S. C. §790) contributions to an organization required to register as a Communist-front may not be deducted for Federal income-tax purposes, nor is the organization entitled to Federal tax exemption.

Summary of Argument

I. The Communist-front provisions of the Subversive Activities Control Act are profoundly different in a constitutional sense than the Communist-action provisions held constitutional in *Communist Party* v. *Subversive Activities Control Act,* 367 U. S. 1. That difference consists in the fact that a Communist-action organization is under the control and domination of a foreign power. A Communist-front organization, however, has no such foreign ties and cannot, therefore, be burdened with the limitations that the Act imposes on First Amendment freedoms. This distinction is made express in the Congressional findings that introduce the Act, and in the statute's definitions and criteria. Likewise, this qualitative distinction was expressly recognized both by this Court and the Court of Appeals in *Communist Party* v. *Subversive Activities Control Board.* The distinction between organizations with direct foreign ties and those without such ties is of a magnitude that, in the application of the "balancing" test, tips the scale in favor of the preservation of the guarantees contained in the first amendment.

II. *Amicus,* however, disagrees that the balancing test is consistent with the authentic meaning of the First Amendment. In the context of this case, the best standard is that expressed in *De Jonge* v. *Oregon,* 229 U. S. 353, which holds that while there may be some circumstances in which the government may have a legitimate concern over *what* is said, it is commanded by the First Amendment to be wholly disinterested in who says it.

III. The provisions of the Act that define a Communist-front organization and establish the criteria to be used to determine whether an organization shall be so labeled, are unconstitutionally vague and uncertain; they encompass a limitless range of acts and omissions. The holdings of the Supreme Court in *Gramp* v. *Board of Public Instruction,*

368 U. S. 278, and *Baggett* v. *Bullitt*, 377 U. S. 360, are on all fours with the case at bar and require the conclusion that the Act offends due process of law. This conclusion is particularly indicated where the statute at the same time inhibits the freedoms protected by the First Amendment.

ARGUMENT

POINT I

The requirement of the Subversive Activities Control Act that Communist-front organizations register, violates the First Amendment on its face, and as applied to petitioners. The decision of this Court in *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1 (1961) is narrowly drawn to hold constitutional only the provisions respecting Communist-action organizations, as applied to the Communist Party of the United States. The holding of constitutionality was based expressly on findings that the Communist Party was directly and deeply involved with what Congress found to be a foreign revolutionary threat against the existence of the United States government. Since no such relationship has been demonstrated with respect to alleged Communist-front organizations, the First Amendment commands a holding of unconstitutionality. This Court eschewed any holding of the constitutionality of the Communist-front registration provisions, carefully limiting its holding to the constitutionality of the registration of Communist-action organizations. The Court of Appeals erred in assuming that this Court saw no constitutional distinction between the two. The Court of Appeals' decisions in the Communist-front cases are likewise inconsistent with its own prior decision in the *Communist Party* case, where the distinction received considerable recognition.

In *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1 (1961), this Court upheld the constitutionality of the provisions of the Subversive Activities Control Act which require the registration of Communist-action organizations, and their specific application to the Communist Party of the United States. The two cases to which this brief *amicus curiae* is addressed, present the first occasion for the consideration by this Court of the constitutional limits on the registration requirements as applied not to the Communist Party, nor to any other Communist-action organization, but to alleged Communist-front organizations.

There is a profound and constitutionally-significant difference between Congress' constitutional power with respect to a Communist-action organization and its power with respect to a so-called Communist-front organization. The essence of this difference is that a Communist-action organization is by definition an integral part of what Congress has found to be the world Communist movement which is directly under the control and domination of a foreign power. Conversely, no such attribution can be or has been made, consistent with the constitutional protections of the First Amendment, to alleged Communist fronts.

The Court of Appeals for the District of Columbia is the only Court which has ruled on the constitutionality of the registration provisions for both categories of organizations. In the *Communist Party* case,[1] after considerable constitutional analysis and discussion, the Court of Appeals upheld the statute. In the two cases which are the subject of this brief, the Court of Appeals held the Communist-front registration provisions to be constitutional, but these holdings, as appears below, were bare of

[1] *Communist Party* v. *Subversive Activities Control Board*, 223 F. 2d 531; 254 F. 2d 314; 277 F. 2d 314; 277 F. 2d 78.

any constitutional discussion at all, much less any persuasive analysis.

In the *Communist Party* case, the Court of Appeals expressly found[2] on the basis of the record before the Subversive Activities Control Board that the Communist Party's objectives were 1) the overthrow of the United States government by force and violence; 2) the establishment in the United States of a Communist totalitarian dictatorship; and 3) the subservience of such totalitarian dictatorship to the Soviet Union. This Court expressly affirmed the tripartite finding.[3]

Both this Court and the Court of Appeals recognized that the statute infringed on First Amendment rights.[4] However, the infringement was held constitutionally permissible in the case of the Communist Party because the First Amendment, in the view of the judges subscribing to the majority opinions in this Court and the Court of Appeals, must yield to the necessity of self-preservation when the government is directly confronted with a threat of forcible overthrow by the Soviet Union.

No such findings of direct foreign domination and control, and dedication to and pursuit of forcible overthrow, were made with respect to Communist-front organizations either in general by Congress, or with respect to petitioners by the Board. Consequently, whatever constitutional justifications may have existed for validating the registration provisions of the Act insofar as they concern the Communist Party or Communist-action organizations in

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[2] 254 F. 2d 314, 319.

[3] 367 U. S. 1, 55-56.

[4] 367 U. S. 1, 89, 90, 96, 102 and 223 F. 2d 531, 544. See discussion on this point, *infra*, at pp. 18-19, 24-25.

general, such justifications are conspicuously absent with respect to the so-called Communist-front organizations.

This distinction pervades the statute, the findings of the Board, and the lengthy opinions of Mr. Justice Frankfurter and Circuit Judge Prettyman upholding the statute as applied to the Communist Party. But the opinions of Judge Prettyman in the two cases at bar, as well as the other "front" cases, fail to recognize this vital constitutional distinction. They are therefore sharply out of phase with the opinions in the *Communist Party* case.

This section of the brief presents the evidence of these distinctions in the statute itself, their recognition by the Court of Appeals and this Court in the *Communist Party* case, and our critique of the decisions of the Court of Appeals in the "front" cases. We conclude by showing that this argument, both expressly and by implication, has been recognized by this Court in other decisions involving the constitutional power of Federal and State governments to legislate in the area of First Amendment freedoms.

A. The distinction in the statute.

1. *Congressional findings.*

Of the 15 specifications of Congressional findings of "Necessity for legislation",[5] *only one* makes any reference to Communist-front organizations.[6] It is significant that this very finding concedes that Communist-front organizations have members and supporters who in fact do not support the Communist objectives of forcible overthrow and establishment of a Communist totalitarian dictatorship

[5] Act, §2; 50 U. S. C. §781.

[6] Act, §2(7); 50 U. S. C. §781(7).

The last sentence of the seventh finding reads: "One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of and the

subservient to the Soviet Union.[7] It follows that to brand an organization a "Communist-front" stigmatizes persons twice removed from the category of Communists. Persons who are not Communist Party members or even conscious supporters, but merely members or supporters of an organization whose alleged relationship with a Communist-action organization was not apparent to them; or it may include persons whose membership in or support of the alleged Communist-front organization was based on issues or activities or relationships quite apart from questions of Communism; or it may refer to persons to whom the entire question of shades of Communism or non-Communism was a matter of indifference.[8] But in any event, the Congressional finding is clear that there are such persons in Communist-front organizations—persons without knowledge of what Congress has found to be "the true purposes of and the actual nature of the control and influence exerted upon such 'Communist fronts'."[9]

That these persons at least are protected by the Constitution is made clear by the decision of the Supreme Court

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actual nature of the control and influence exerted upon such 'Communist fronts.' ".

[7] The court below, in the companion case *National Council of American-Soviet Friendship* v. *Subversive Activities Control Board*, which set aside a Board registration order, recognized that there were "a considerable number of individuals who by statutory definition did not know that these directors were Communist Party operatives." 322 F. 2d 375, 382.

[8] This is especially true of the Veterans of the Abraham Lincoln Brigade. Other than the Veterans there was no organization for returning Spanish Civil War volunteers to join. Indeed the Board has admitted that it was unable to identify more than seventy of petitioner's several hundred members as having been Communist Party members at any time (R. 199). This concession is an extremely apt illustration of the unconstitutionality of the seventh finding. Not only some of its members, but apparently a decisive majority, cannot be said to have scienter. To put the entire episode in its historical context, see Thomas, *The Spanish Civil War* (1961).

[9] See note 7, *supra*.

in *Wieman* v. *Updegraff*, 344 U. S. 183, 190-191. In *Wieman*, Mr. Justice Clark, for a unanimous court, wrote that:

> "• • • [U]nder the statute before us, the fact of membership alone disqualifies. If the rule be expressed as a presumption of disloyalty, it is a conclusive one.
>
> "But membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes • • •. At the time of affiliation, a group itself may be innocent • • •. Conversely, an organization formerly subversive and therefore designated as such may have subsequently freed itself from the influences which originally led to its listing.
>
> "• • • Yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources • • •. Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power."

In the words of *Wieman* v. *Updegraff*, Congressional finding No. Seven is an "indiscriminate classification of innocent with knowing activity." It authorizes the harmful Communist-front brand in the absence of any evidence of scienter on the part of members or supporters. Indeed, it goes further. In *Wieman*, it was logically possible that all members of the proscribed organization possessed the "guilty" knowledge of their association. But the Internal Security Act authorizes such harmful branding notwithstanding the fact that the statute itself recognizes that the organization contains members who are innocent.

Aptheker v. *Secretary of State*, 378 U. S. 500 (1964), makes this point very explicitly in the context of the statute at bar:

> "The prohibition against travel [in Section 6 of the Control Act] is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe. The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment and purposes in and places for travel."

Virtually all the other findings, and the findings read as a whole, bristle with references to the danger of forcible overthrow of the United States government and its replacement by a totalitarian dictatorship subservient to that of the Soviet Union, all as a result of the revolutionary conspiratorial objectives and tactics of the world Communist movement whose "direction and control * * * is vested in and exercised by the Communist dictatorship of a foreign country."[10] Communist action organizations are established in various countries, the Congressional findings continue, as "sections of a world-wide Communist organization,"[11] controlled, directed and subject to the discipline of the Soviet government. And, according to Finding No. Six:

> "The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if neces-

[10] Act, §2(4); 50 U. S. C. §781(4).

[11] Act, §2(5); 50 U. S. C. §781(5).

> sary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves." [12]

Conversely, whatever else a "front" organization may be, it does not have the foregoing attributes of a Communist-action organization. Finding No. Seven, when placed in the context of the other findings, and particularly Finding No. Six, demonstrates that a "front" must be something other, and less evil, than an organization which uses force to set up a Communist totalitarian dictatorship. Findings Nos. Six and Seven, read together, suggest yet another difference, that between the deceivers and the deceived, the dupers and the duped. If there is no difference between the two kinds of organizations, Congress would not have made the distinction.

Furthermore, while the membership of a Communist-action organization, according to Congress, is consciously participating in violent revolutionary means and goals, a significant portion of the membership of a front organization is free of this taint. To argue otherwise is to ignore the distinctions drawn by Congress. One cannot have it both ways. If they are different, the difference must be

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[12] Act, §2(6); 50 U. S. C. §781(6).

in qualitative terms. This qualitative difference has constitutional consequences.

2. *Statutory definitions.*

Compatible with the findings, there is a vast difference in the statutory definition of Communist-action organization[13] and Communist-front organization.[14] Each definition has what may be called a "control" component, and an "operations" component. But there the similarity ends. In the first instance, while a Communist-action organization is by definition "substantially directed, dominated or controlled by the Soviet Union," a Communist-front organization is defined as controlled not by a foreign power, but by a Communist-action organization. In the second instance, while a Communist-action organization is by definition one which "operates primarily to advance the objectives of such world Communist movement", a Communist-front organization's operations are, by definition, "for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement."

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[13] "The term 'Communist-action organization' means

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in said section." Act, §3(3)(a); 50 U. S. C. §782(3)(a).

[14] "The term 'Communist-front organization' means any organization in the United States (other than a Communist-action organization as defined in paragraph (3) of this section) which (A) is substantially directed, dominated, or controlled by a Communist action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title." Act, §3(4); 50 U. S. C. §782(4).

Thus, in both segments[15] of the respective definitions, a Communist-front organization is at least one dimension away from a Communist-action organization. By definition, a Communist-action organization is controlled by the Soviet Union, and a Communist-front organization is at most only indirectly and through the intermediary of a Communist-action organization, related to the foreign power bent on forcible overthrow. By definition, a Communist-action organization operates to advance the objectives of world Communism, to wit, forcible overthrow, etc., but a Communist-front organization does not. By definition, the Communist-front organization acts not to "advance the objectives", but merely to "aid and support".

Furthermore, the definition of Communist-front organization is met by an organization whose "aid and support" is not directly linked to the Soviet Union, but only indirectly, through the intermediary of a Communist-action organization. Consequently, as concerns the "operations" component, a Communist-front organization may well be not one but two dimensions apart from a Communist-action organization: 1) It is not itself engaged in the realization of Soviet objectives, but merely gives "aid and support"; and 2) such "aid and support" may well be to a Communist-action organization, rather than to the foreign power itself.[16]

3. *Statutory criteria.*

Additional evidence of these vital distinctions is contained in the broad differences in criteria for determination of Communist-action organizations[17] and Communist-front

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[15] The conjunctive "and" is used in both definitions. Therefore the determination of any issue resting on the definition must take into account the aggregate effect of both the "control" component and the "operations" component.

[16] Notes 13 and 14, *supra*.

[17] Act, §13(c); 50 U. S. C. §782(c).

organizations.[18] There are eight criteria for the determination of a Communist-action organization, two of which are similar to two of the four criteria for determination of a Communist-front organization.[19] A comparison of the criteria demonstrates once again that where Communist-action organizations are concerned, the statute revolves around specific foreign-directed revolutionary aims of forcible overthrow.[20] Where Communist-front organizations are concerned, however, the standards are nebulous, vague,[21] general, and not related to these aims, except through the necessary intermediary of a Communist-action organization.[22] Much more significantly, however, the Communist-front organization criteria are all decidedly in the speech sector of the speech-action continum.[23]

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[18] Act, §13(f); 50 U. S. C. §792(f). See pp. 43-44, *infra*.

[19] Communist-action organization criterion 2, §13(e)(2), dealing with non-deviation, resembles Communist-front organization criterion 4, §13(f)(4). Communist-action organization criterion 3, §13(e)(3), dealing with receipt of financial and other support, is similar, in part, to Communist-front organization criterion 2, §13(f)(2).

[20] Specifically, criterion 1 refers to directives of a foreign government; criterion 4 to foreign instruction; criterion 5 to reports to a foreign government; criterion 6 to subjection to disciplinary power of a foreign government; criterion 7 to various surreptitious devices for the purpose of concealing foreign direction; and criterion 8 to foreign allegiance.

[21] See discussion of vagueness in Point III, *infra*.

[22] Just as "foreign" is the key word in the criteria of §13(e), "Communist-action organization" are the key words in the criteria of §13(f). There is nothing in any of the §13(f) criteria referring to foreign directives, instruction, reports, discipline, or allegiance.

[23] By the defining effect of these criteria, a Communist-front organization does not receive and execute foreign directives; does not send its people abroad for instruction; does not report to a foreign government; is not involved with allegiance to and discipline by a foreign government. The activities that fit into the Communist-front organization criteria are speech and association, and things ancillary thereto such as organization, membership and finances.

4. Constitutional significance of these statutory distinctions.

The respondent's reply to *Amicus'* brief in the court below sought to minimize these distinctions by imputing to us the claim that "when [the Party] acts through a controlled instrumentality in which the word 'Communist' does not appear . . . its privacy is constitutionally protected" (p. 3). That, obviously, is not the claim at all. Rather, the argument is directed towards the differences acknowledged by Congress in the three substantive elements of the statute: the stated purposes, the definitions, and the criteria. Assume, for example, a third category of organizations which bear the same statutory relationship to Communist-front organizations as Communist-front organizations bear to Communist-action organizations. Are such hypothetical organizations and their members to have no greater First Amendment protection than the conspiratorial, revolutionary, force and violence-bent Communist Party itself? According to the Subversive Activities Control Board, the answer is no, since its reply to *Amicus'* brief below suggests "by parity of reasoning" that the stigma of registration could be constitutionally applied to such organizations.

How far can the Board go, compatible with the constitutional power it derives from Congress, with this "holding company" concept? There must be some point beyond which the constitutional power to restrict the free speech of Communist-action revolutionaries cannot be stretched. But the Board would make this a limitless power, subject only to its own fallible findings. There are those in and out of government who would include such organizations as Women's Strike for Peace, the Socialist Party, the National Association for the Advancement of Colored People, The American Jewish Congress, the Americans for Democratic

Action, and *Amicus* itself, within the rubric of "Communist". These organizations would be the first to admit that there are certain issues on which they could be brought within the "non-deviation" criteria. Is the only determinant to be whether or not a majority of the Board make the requisite findings, and a majority of the reviewing courts approve it? There must be a constitutional limit reached at some point as one travels from the Communist-action revolutionary nucleus, outwards into other organizations and groupings. *Amicus* contends that the so-called Communist-fronts are beyond that limit.

B. The distinction in the courts.

Both this Court and the Court of Appeals have amply demonstrated, in their decisions in *Communist Party* v. *Subversive Activities Control Board*, the critical importance of foreign control as a prerequisite to the constitutionality of the Act under the First Amendment. But the Court of Appeals has erroneously cast all of this aside in its decisions in the "front" cases.

1. *The Court of Appeals in the* Communist Party *case.*

Judge Prettyman, in addition to delineating the Congressional findings, repeated a considerable amount of the historical and other findings made by the Board, beginning with the formation of the Russian Communist Party in 1898.[24] Throughout these findings there are numerous explicit references to control of the American Communist Party by the Soviet Union and its adherence to the objectives of forcible overthrow.[25]

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[24] 223 F. 2d 531, 566.

[25] For example:

> "The crucial factor in the statute before us is the aim, spelled out in detail, of the world Communist movement to disestablish our system of government." Id. at 560. "The

Judge Prettyman's opinion calls on American historical precedents to illustrate the power of our government to ensure its own self-preservation. "Antipathy to domination or control by a foreign government * * * is a basic policy in this nation." References are made to the Articles of Confederation, the Constitutional Convention, the Genet Affair, the War of 1812, the League of Nations, "such qualms as there are concerning the United Nations", all with a view to demonstrate that "This country has always unequivocally repudiated any action which has seemed to contain the element of foreign control over our governmental affairs."[26]

But at the same time that the Court of Appeals reaffirmed the prerogative of self-preservation, it recognized that the statute "will interfere with freedoms of speech and assembly" since "realistically the registration and sanction provisions will exert restriction upon what otherwise might be a wider latitude of expression."[27] However, "[T]he right to free expression ceases at the point where it leads to harm to the Government",[28] and since the foreign danger to our government recited in the statute, includes "espionage, sabotage, terrorism * * * terms of action * * *, it can be met with action by the Government."[29]

Most significantly, Judge Prettyman concludes his discussion of the First Amendment problem with a reference to *American Communications Association* v. *Douds,* 339

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point is foreign domination * * * *." Id.* at 561. "Surely a government owes no duty of protection to those who, dominated by a foreign organization, seek its overthrow." *Id.* at 555.

[26] *Id.* at 543.

[27] *Id.* at 544.

[28] *Ibid.*

[29] *Id.* at 546.

U. S. 382, and the restrictions on Communist trade union officers which the Supreme Court there held to be constitutionally permissible. His precis of the *Douds* holding concludes:

> "• • • the answer to the implication that if the statute were upheld the power of government over belief would be as unlimited as its power over conduct, is that the result does not follow 'while this Court sits'."[30]

Perfectly consistent with the Court of Appeals' opinion is its logical extension: inasmuch as no such direct involvement with a foreign power bent upon forcible overthrow exists with respect to an alleged Communist-front organization, we deal here entirely with beliefs rather than action.[31]

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[30] *Id.* at 546. Judge Prettyman then makes the observation that "The concurring opinion throws much light upon this problem." It would seem that the reference is to the Concurring Opinion of Mr. Justice Jackson in *Douds*, 339 U. S. 382, 422. This concurrence flatly states that just about anything is permissible so long as only Communists were affected; but the statute there under review would be unconstitutional against Socialists, and against any other non-Communists. *Douds, supra* at 422. Furthermore Mr. Justice Jackson dissented from so much of the opinion of the court as affected persons with Communist beliefs, as distinguished from those who committed the overt act of Party membership. *Id.* at 435-445. Is not Judge Prettyman's interest in this concurrence bottomed on its sharp and deliberate limitation of the restriction exclusively to Communist Party members?

[31] *Douds, supra,* upheld Congressional power to effectively bar Communists from labor union office. It was based on Congressional findings concerning the fomenting of political strikes. Nothing in the *Douds* case would seem to sanction the constitutionality of any attempt to restrict the rights of speech or association of any variety of political or economic non-conformity—members of alleged Communist-front organization's included—absent a specific showing of Communist Party membership or affiliation. Mr. Chief Justice Vinson, speaking for the *Douds* majority, pointed out that although the statute in question was upheld, a broader statute compelling political disclosure would be a violation of the First Amendment: "A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature." *Id.* at 402. The registration and labelling provisions of the Act prescribe exactly that.

Yet in the front organization cases, the Court of Appeals seems to have overlooked or discarded its own prior careful reasoning. Notwithstanding all of the specifications pointing to the extraordinary nature of foreign domination, and its constitutional significance, the Court of Appeals in the instant cases, and in the companion cases, summarily upheld constitutionality without discussion.

Amicus urges this Court to retrieve the principles originally enunciated by the Court of Appeals, and since abandoned by it. Although the Court of Appeals was loath to do so when faced with the inescapable consequences of its own reasoning, this Court should validate the forsaken pledge that while it sits the government's power over beliefs will not be as unlimited as its power over conduct.[32] Otherwise, the "latitude of expression" [33] that should flourish throughout the Nation will be fatally constricted.

2. *The Supreme Court in the* Communist Party *case.*

The frequently implied and often articulated minor premise in the first Court of Appeals case runs through Mr. Justice Frankfurter's majority opinion in this Court.[34] The special nature of foreign control is underscored throughout.

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[32] The conduct-belief comparison seems to have its origin in Mr. Chief Justice Vinson's warning in *Douds, supra* at 399, that "we must recognize, moreover, that regulation of 'conduct' has all too frequently been employed by public authority as a cloak to hide censorship of unpopular ideas."

[33] See text at note 27, *supra*. The distinction between a foreign dominated organization such as the Communist Party, has been held to be, and a hypothetical "domestic organization" which has "a partial non-deviation" from the policies of the foreign organization, was most provocatively noted by Judge Prettyman. 223 F. 2d at 561. This intimates precisely what *Amicus* is arguing: that inasmuch as the essential prerequisite of foreign domination is not present, the statute as applied to Communist-front organizations is invalid.

[34] 367 U. S. 1-115.

At the outset of the discussion of law, Mr. Justice Frankfurter observes:

> "A foreign government 'dominates' or 'controls' the 'direction' of the world Communist movement through very different means and in very different ways than one organization 'dominates' or 'controls' another. * * *"[35]

The discussion then proceeds with an analysis of the nature of control and domination of a Communist-action organization by a Communist foreign government. Of course no case involving a Communist-front organization or the Communist-front criteria was before the Court, and Mr. Justice Frankfurter was probably the Supreme Court Justice least likely to comment on an "unripe" or unpresented question.[36] But the implication is nonetheless clear. The presence of a Communist foreign government as one of the parties to a relationship effectively introduces an ingredient which makes such relationship different than any other relationship, including the relationship between a Communist-action organization and a Communist-front organization which it is alleged to dominate or control.

Following the pattern set by the Court of Appeals, this Court deemed it wise to set forth *in haec verba* a considerable amount of the Board's findings with respect to Soviet domination and control of the American Communist Party.[37] In twelve pages of verbatim quotations, Mr. Justice Frankfurter outlined the principal findings of the Board: the history of the Communist International (Com-

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[35] *Id.* at 38.

[36] "No rule of practice of this Court is better settled than 'never to anticipate a question of constitutional law in advance of the necessity of deciding it.' *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners*, 113 U. S. 33, 39." *Id.* at 71-72.

[37] *Id.* at 42-54.

intern) beginning with its organization in Moscow, in March, 1919, through its various Congresses; the activities of the Political Bureau of the Communist International and its supervision of Communist Parties in the various nations of North America; the membership of the American Communist Party in the Comintern; the so-called "Conditions of Admission" to the Communist International"; the significance of the claimed dissolution of the Comintern; the attendance of leaders of the American Communist Party at Moscow for schooling and instructions; actions taken by the Comintern to cause organizational changes in the American Communist Party; the unquestioned control by Stalin of the Comintern; the circumstances of the change to "Communist Political Association," and its reorganization as the Communist Party after the Duclos letter; the presence of Comintern representatives in the United States to supervise Party activities.[38]

These findings are replete with what the Board was satisfied to regard as documentation of the American Communist Party's foreign control and its direct action relationship to the program of a foreign power dedicated to forcible overthrow of our government.[39] And this Court held that these findings of the threat "not only to existing government in the United States but to the United States as a sovereign, independent nation", could not be dismissed "as unfounded or irrational imaginings."[40]

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[38] *Ibid.* See text at note 3, *supra.*

[39] *Id.* at 55-56. Of particular significance—and considerable attention is devoted to these items in the majority opinion—are the affairs of the "Starobin letter," and the Childs-Weiner conversations. These related directly to fiscal subsidization from the Soviet Union for American Communist Party activities, and to directions allegedly transmitted to the American Communist Party by D. Z. Manuilsky, a Ukrainian S. S. R. United Nations delegate. *Id.* at 22-29.

[40] *Id.* at 95. Congress' power here is explained in terms of its inherent power to provide "resistance against foreign incursion." *Ibid.*

On the other hand, the Board's findings with respect to the Veterans, for example, are of an entirely different quality. There is some attention devoted to showing "rapport" [41] between it and the Communist Party, and certain evidence is set forth concerning Party members' activity in the Veterans, and vice versa.[42] But the thrust of the Board Report is not with action of this or any sort. It is rather with expressions of opinions and attitudes on various contemporary issues: World War II, release of certain political prisoners, the Government of Finland, Hemingway's *For Whom the Bell Tolls,* Spain and Latin America, China, Greece, the Truman Policy and the Marshall Plan, Korea, Congressional Committees, and internal security legislation.[43] This is so clearly in the category of speech and association that further argument seems superfluous.[44]

Likewise of considerable significance in this Court's decision upholding the registration requirement as applied to the Communist Party, is Mr. Justice Frankfurter's concern with the Act's severability clause.[45] He wrote:

> "The authoritative legislative history clearly demonstrates that a major purpose of the enactment was to regulate Communist-action organizations by means of the public disclosure effected by registration, apart from the other regulatory provisions of the Act. Such

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[41] R. 109.

[42] R. 105, 113.

[43] R. 131-147.

[44] Petitioners have claimed throughout these proceedings that the positions which they have taken on many public policy questions were shared by many highly-respected and unmistakably non-Communist Americans.

[45] 367 U. S. at 77.

> is, of course, the very purpose of the severability clause. This being so, our consideration of any other provisions than those of Sec. 7, requiring Communist-action organizations to register and file a registration statement, could in no way affect our decision in the present case. Were every portion of the Act purporting to regulate or prohibit the conduct of registered organizations (or organizations ordered to register) and of their members, as such, unconstitutional, we would still have to affirm the judgment below."

This concern with the severability of strictures reflects the concern for the constitutional distinctions between Communist-action organizations and all other organizations. The inference is clear that the majority intended this language as a caveat to those who might too easily apply the Act to other than Communist-action organizations.[46]

But the essence of the majority opinion is the application of the balancing test. That the registration provision of the Act will inevitably have a restrictive effect on freedom of speech, freedom of assembly, and freedom of association, is conceded at the outset.[47] Mr. Justice Frank-

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[46] It is of special significance that Mr. Justice Frankfurter, who is known to have chosen every word with deliberateness, wrote in the first sentence of the excerpt quoted above that the major purpose of the Act was regulation, via registration and disclosure, of "Communist-action organizations". He could just as easily, and perhaps even more accurately, have written that the major purpose of the Act was to regulate "Communist organizations", or "Communist action and Communist front organizations." In the context of the discussion of the severability clause, the limitation to "Communist action" and the consequent and perhaps deliberate omission of "Communist front," demonstrates a critical approach to the constitutionality of the provisions for registration of Communist-front organizations.

[47] Freedom of speech and assembly, 367 U. S. at 89, citing *Thomas* v. *Collins*, 323 U. S. 516; freedom of association, *id.* at 90-93, citing

furter stated, however, that these freedoms are not absolute, and that the First Amendment does not bar limitations or restrictions if there is a sufficiently weighty public interest to be served by the speech-limiting governmental regulation. On one side of the balance is the interest in maintaining freedom of expression and association; on the other is the public interest, as declared by Congress, in the requirement that Communist-action organizations make public disclosure via registration.[48] Mr. Justice Frankfurter states quite specifically that the non-free speech side of the scales varies with 1) "the magnitude of the public interests which the registration and disclosure provisions are designed to protect", and 2) "the pertinence which registration and disclosure bear to the protection of those interests."[49] And the conclusion is then reached that in this instance the balance is in favor of the regulation.[50]

This section of the opinion contains repeated references and reminders that the foreign-controlled Communist Party pursues forcible overthrow of our government and its replacement by a totalitarian dictatorship subservient to the Soviet Union; that such methods have succeeded in other countries; that sabotage and espionage have been successfully perpetrated. It is these considerations, the opinion held, which justify the repression of First Amendment freedoms.[51]

NAACP v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 576; *Shelton* v. *Tucker*, 364 U. S. 479.

[48] 367 U. S. at 96-97.

[49] *Id.* at 93.

[50] *Id.* at 102-105.

[51] *Ibid.* Mr. Justice Frankfurter takes pains to distinguish the "freedom of association" cases arising from struggles of the National Association for the Advancement of Colored People to carry on its lawful activities in the South.

Following this reasoning and applying the balancing test, it follows that with anything other than a Communist-action organization involved, the scales do not tip in favor of regulation. And, not surprisingly in the light of the various intonations in the opinion to which we have referred previously, Mr. Justice Frankfurter concludes his discussion on the First Amendment with an express disclaimer:

> "It is argued that if Congress may constitutionally enact legislation requiring the Communist Party to register, to list its members, to file financial statements, and to identify its printing presses, Congress may impose similar requirements upon any group which pursues unpopular political objectives or which expresses an unpopular political ideology. Nothing which we decide here remotely carries such an implication. The Subversive Activities Control Act applies only to *foreign-dominated* organizations which work primarily to advance the objectives of a world movement controlled by the government of a *foreign* country. See 3(3), 2(4). It applies only to organizations directed, dominated, or controlled by a *particular* foreign country, the leader of a movement which, Congress has found, is 'in its origins, its development, and its present practice, * * * a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups * * *, espionage, sabotage, terrorism, and any other means deemed necessary to

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See note 47, *supra*. The distinction is essentially that while there was insufficient "magnitude of * * * public interests" to justify compulsory registration of the NAACP, the "magnitude" is sufficient with respect to the foreign-dominated Communist Party. *Amicus*, however, does not agree that any balancing test may be constitutionally used when First Amendment freedoms are at stake. See discussion, *infra*, pp. 37 et seq.

> establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.' 2(1). This is the full purported reach of the statute, and its fullest effect. There is no * * * attempt here to impose stifling obligations upon the proponents of a particular political creed as such, or even to check the importation of particular political ideas from abroad for propagation here. The Act compels the registration of organized groups which have been made the instruments of a long-continued, systematic, disciplined activity directed by a foreign power and purposing to overthrow existing government in this country." [52]

C. The Court of Appeals in the "Front" cases.

The Court of Appeals' affirmances below failed to recognize the constitutional significance of the distinctions we have pointed out. This oversight is not only inconsistent with the many indications given by this Court in the *Communist Party* case that the distinctions must be recognized; it is equally inconsistent with the Court of Appeals' own opinion in the *Communist Party* case. Furthermore, the implication by the Court of Appeals that this Court, in the *Communist Party* case, upheld the constitutionality of registration orders applied to Communist-front organizations, is entirely without substance.

Six decisions by the Court of Appeals, on petitions to review Communist-front registration orders, contained at least passing references to the question of constitutionality of the registration requirements as applied to Communist-front organizations. In four of these, registration orders were upheld. In one, the registration order was reversed.

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[52] 367 U. S. at 104-105.

In another, because of the apparent dissolution of the organization, the proceeding was "remanded to the Board with instructions to place it in an indefinitely inactive status."

Labor Youth League v. *Subversive Activities Control Board*, 322 F. 2d 364, the dissolution case, was the first Communist-front case decided by the Court of Appeals. Because of its view as to the disposition of this case, the Court expressly held it unnecessary to consider whether the statute would be constitutional if applied to the organization and its members.

The second Communist-front organization decision by the Court of Appeals, *National Council of American-Soviet Friendship* v. *Subversive Activities Control Board*, 322 F. 2d 375, set aside the Board order on the ground that the government failed to sustain its burden of proof that the organization was directed, dominated or controlled by the Communist Party. Part XIII of the opinion, referring to the constitutional arguments that the registration provisions infringe on First Amendment rights, quotes a portion of Mr. Justice Frankfurter's disclaimer[52a] from the *Communist Party* case, and concludes:

> "Since in our view of the case it can be decided on non-constitutional grounds, we do not pass upon the foregoing and other constitutional points pressed upon us. . . ." 322 F. 2d at 392.

On December 17, 1963, the Court of Appeals affirmed four Communist-front registration orders, *Louis Weinstock (United May Day Committee)* v. *Subversive Activities Control Board*, 331 F. 2d 75; *Jefferson School of Social Science* v. *Subversive Activities Control Board*, 331 F. 2d 76; *American Committee for the Protection of the For-*

[52a] *Ibid.*

eign Born v. *Subversive Activities Control Board*, 331 F. 2d 53, and *Veterans of the Abraham Lincoln Brigade* v. *Subversive Activities Control Board*, 331 F. 2d 64.

In *Jefferson School*, the entire discussion of constitutionality consists of an abbreviated observation that since the Supreme Court sustained the constitutionality of the registration provisions in the *Communist Party* case, there was simply nothing more to be said. "Relying upon that authority," the Court said, "we now reject the contentions of the petitioner in that regard." 331 U. S. at 82.

The language is obviously ambiguous, since the "registration provisions" could apply to (1) Communist-action organizations; (2) Communist-front organizations; or (3) Communist organizations as a whole.

The Court of Appeals hints at an answer to this question in its decisions in the *Weinstock* and *American Committee* cases. *Weinstock's* concluding paragraph notes that the Supreme Court held in the *Communist Party* case that the Act was constitutional "when applied to a Communist-action organization". And then:

> "This court held in Veterans of the Abraham Lincoln Brigade v. Subversive Activities Control Board, decided today, that the opinion in the *Communist Party* case encompasses the statute when applied to Communist-front organizations." 331 F. 2d at 76.

American Committee is to the same effect. It concludes that the question whether "the registration provisions of the Internal Security Act are unconstitutional" need not be considered because

> "We have ruled upon these points in other cases, to which we have referred, *supra*." 331 F. 2d at 61.

The reference is apparently to footnote 8 of the opinion which merely cites *Labor Youth League, National Council* and *Veterans of the Abraham Lincoln Brigade.*

Since neither the *Labor Youth League* nor the *National Council* cases shed any constitutional light, and since all of the December 17th decisions apparently point to the *Veterans* case exclusively as containing the authoritative constitutional exposition, one turns eagerly to that decision.

Here again, the Court of Appeals devoted the concluding section of its opinion to the constitutional questions. We set forth that section of the opinion in its entirety:

> "The Brigade argues that, although the Supreme Court held Section 7 of the Act (the registration requirement) to be constitutional when applied to a Communist-action organization, the reasons given are not applicable to a Communist-front organization; and that as to the latter Section 7 is invalid. The argument is that the conclusion of the Court was premised upon the congressional findings concerning the world Communist movement, its purposes, and its methods of operation (Secs. 3(3) and 2(4)); and that there is nothing in this record to support a finding that the Brigade was foreign-controlled and operated or was utilized to bring about the overthrow of the government or the establishment here of a totalitarian dictatorship. But we think the Supreme Court's opinion is not so narrowly based. The purposes of the Act, said the Court, are expressed in Section 2 and the registration section is not 'lacking in consonance' with those provisions. Section 2 of the Act, in subparagraph (7), recites that Communist organizations 'operate to a substantial extent through organizations commonly known as "Com-

> munist fronts".' So, as a matter of statutory constitutionality, we are of opinion that the conclusions reached by the Court in the cited case apply here. The discussion of the subject by the Court is too long to repeat. A reading of the whole of it will demonstrate its applicability to Communist fronts." 331 F. 2d at 73.

The Court of Appeals thus apparently held that this Court, in affirming the constitutionality of the registration provisions for Communist-action organizations, simultaneously—either expressly or by unmistakable implication—upheld the constitutionality of the registration of Communist-front organizations. Two points are made in support of this construction: (1) that the Supreme Court held, or implied, or concluded, that the Communist-front registration provisions are not "lacking in consonance" with the purposes of the Act as set forth in Sec. 2, and particularly paragraph seven thereof, the only portion of Sec. 2 which deals with Communist fronts; and (2) the unspecified, unidentified, and uncited "discussion of the subject by the Court", "the whole of it" which is "too long to repeat."

Since the entire Court of Appeals' holding of constitutionality of registration of Communist fronts in these four cases rests on these two foundations, an analysis of each of them is appropriate.

a) *"The whole of it."* As we have shown, a reading of "the whole" of this Court's decision does not "demonstrate its applicability to Communist fronts." Quite the contrary, it demonstrates a scrupulous avoidance of even the merest suggestion of applicability to Communist fronts. And it contains numerous implications that the constitutional standard may not be met for Communist fronts. The "discussion of the subject" of Communist-fronts by the Supreme Court can hardly be "too long to repeat", since there

is no such discussion anywhere in the opinion. Though the majority opinion contains innumerable references to Communist-action organizations, there are no more than peripheral references to Communist-front organizations, and the court below fails to provide any citation to support its conclusion. Perhaps the two Judges in the majority of the Court of Appeals hold the view that Communist-fronts present no constitutional questions other than those presented by Communist-action organizations. If so, they neglected to say so, but they are plainly in error in attributing their view to this Court.

b) *"Lacking in consonance"*. As one reads the sentences of the Court of Appeals' opinion which rest upon this phrase, one can easily get a mistaken impression. The passage implies that the Supreme Court expressly held that the Communist-front registration provisions are not "lacking in consonance" with the constitutionally permissible purposes of the Act to guard the Republic against forcible overthrow by a Soviet-dominated Communist totalitarian dictatorship. The Court of Appeals' choice of language is unfortunate, since this Court said nothing of the kind.

The "lacking in consonance" language comes from subdivision A of Part V of Mr. Justice Frankfurter's majority opinion, entitled "Outlawry and Attainder". The Party argued that the Act was a bill of attainder which sought to outlaw the Communist Party. Justice Frankfurter reasoned, however, that the consequences of registration were not simply outlawry but had "a rational relation to the purposes of the Act" as expressed in Sec. 2. In support, he recited some of the findings of Sec. 2 and in each case the related consequences of registration. Then he said:

> "None of this is so lacking in consonance as to suggest a clandestine purpose behind the registration provisions." 367 U. S. at 83.

This is the origin of "lacking in consonance." There is nothing in this passage about Communist-front organizations. All of the references to Sec. 2 purposes are expressly related to Communist-action organizations. All of the corresponding references to consequences are to consequences on "such" Communist-action organizations. The Court of Appeals' inclusion of paragraph seven of Sec. 2, the single Communist-front purpose, within this exclusively Communist-action rubric, is purely gratuitous.

D. Recognition of the distinction by this Court in other cases.

Decisions of this Court other than *Communist Party* v. *Subversive Activities Control Board,* support the view that the Communist Party, and only the Communist Party, may be subjected to exceptional constitutional treatment. Particularly relevant are *Sweezy* v. *New Hampshire,* 354 U. S. 234 (1957), *Barenblatt* v. *United States,* 360 U. S. 109 (1959), and *Gibson* v. *Florida Legislative Committee,* 372 U. S. 539 (1963).[53]

Sweezy held that the Attorney General of New Hampshire could not compel disclosure of information concerning the Progressive Party. Such disclosure, this Court held, was forbidden by the First Amendment. The crux of this holding is articulated most clearly in a passage from Mr. Justice Frankfurter's concurring opinion:

> "Whatever, on the basis of massive proof and in the light of history, of which this Court may well take judicial notice, be the justification for not regarding the Communist Party as a conventional political party, no such justification has been afforded in regard to the Progressive Party." 354 U. S. at 266.

[53] The following argument is enhanced by the fact that in *Sweezy* and *Gibson* the decisions were in favor of the individual's claimed right under the First Amendment, while in *Barenblatt* the decision was against the constitutional claim.

Barenblatt upheld the power of the House Un-American Activities Committee to inquire about alleged Communist activities. Mr. Justice Harlan, writing for the majority, states quite specifically, in support of the Committee's right to compel disclosure of the information sought, that this Court has deliberately refused to view the Communist Party as an "ordinary political party." Consequently, and only because the Communist Party is so regarded, Mr. Justice Harlan continued, the Supreme Court has upheld federal legislation which "in a different context, would certainly have raised constitutional issues of the gravest character."[34] Mr. Justice Harlan found it helpful to his analysis to cite and distinguish *Sweezy*. He said quite plainly that the Progressive Party "was too far removed from the premises on which the constitutionality of the State's investigation had to depend to withstand attack . . . ."[35]

In *Gibson*, this Court held that the Miami Chapter of the National Association for the Advancement of Colored People was protected by the First Amendment's guarantee of freedom of association from compulsory disclosure of all or any part of its membership lists. A Committee of the Florida State Legislature was seeking this information for the stated purpose of investigating Communist infiltration into the NAACP. The investigating Committee and the Florida courts which upheld the contempt conviction of Reverend Gibson, the NAACP Chapter President who refused to comply with the Committee's subpoena *duces tecum*, expressly denied any interest in investigating the NAACP. According to the State of Florida the object of the investigation was communism, not race relations. Thus this case was substantially different from such cases as

[34] 360 U. S. at 128.

[35] *Id.* at 127.

NAACP v. *Alabama, supra,* where it was clear that the State's concern was race relations, not communism.

Yet *Gibson* held that there were definite First Amendment limits on the extent to which any organization's freedom of association could be infringed upon, regardless of the stated purpose of the investigation, with but one exception—the Communist Party itself. Mr. Justice Goldberg wrote for the Court, at p. 549:

> "Compelling such an organization, engaged in the exercise of First and Fourteenth Amendment rights, to disclose its membership presents, under our cases, a question wholly different from compelling the Communist Party to disclose its own membership."

In the Board's reply to *Amicus'* brief in the court below, three decisions of this Court are cited for the purpose of showing the existence of constitutional power to investigate communist "infiltration into other groups or organizations" (p. 4): *McPhaul* v. *United States,* 364 U. S. 372 (1960) (Civil Rights Congress); *Wilkinson* v. *United States,* 365 U. S. 399 (1961) (Emergency Civil Liberties Committee); and *Braden* v. *United States,* 365 U. S. 43 (1961) (Southern Conference Educational Fund).

None of these decisions support the Board's contention. In *McPhaul,* no question involving the First Amendment was either argued or decided. And *Wilkinson* and *Braden* both expressly relied upon the distinction between membership in the Communist Party and anything other than membership in the Communist Party which was recognized in *Barenblatt.* As Mr. Justice Stewart pointed out in *Wilkinson,* the investigation into Communist Party membership is permissible because it is in effect an investigation of "persons advocating overthrow of the Government." 365 U. S. at 474.

Thus *Barenblatt, Wilkinson* and *Braden* all upheld the right to investigate the Communist Party because of its special foreign-dominated character. That this is exactly what the three cases held is made clear by the opinion in *Gibson*:

> "In Barenblatt, Wilkinson, and Braden, however, it was a refusal to answer a question or questions concerning the witness' *own* past or present membership *in the Communist Party* which supported his conviction. It is apparent that the necessary preponderating governmental interest and, in fact, the very result in those cases were founded on the holding that the Communist Party is not an ordinary or legitimate political party, as known in this country, and that, because of its particular nature, membership therein is *itself* a permissible subject of regulation and legislative scrutiny." 372 U. S. at 547.

The cases at bar present the same "different context" as that carefully allowed for by this Court in *Sweezy, Barenblatt* and *Gibson*. Like the Progressive Party, petitioners are "too far removed from the premises on which * * * constitutionality * * * [has] to depend * * *."[56]

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[56] *Ibid.* See concurring opinion of Mr. Justice Jackson in *American Communications Association* v. *Douds*, 339 U. S. 382, 422-33:

> "If the statute before us required labor union officials to forswear membership in the Republican Party, the Democratic Party, or the Socialist Party, I suppose all agree that it would be unconstitutional. But why, if it is valid as to the Communist Party?
>
> The answer, for me, is in the decisive differences between the Communist Party and any other Party of any importance in the long experience of the United States with party government. . . . The Communist Party, at least outwardly, only exaggerates these well-worn political techniques and many persons are thus led to think of it as just another more radical political party. If it were nothing but that, I think this leg-

POINT II

The Subversive Activities Control Act violates the First Amendment because it is not narrowly drawn to meet the alleged danger, offends the clear and present danger test, and runs afoul of *DeJonge* v. *Oregon*.

The preceding section of this brief was devoted exclusively to the development and presentation of *Amicus'* thesis that there is a vital and substantial distinction—a distinction with constitutional consequences—between the power of government to abridge the First Amendment freedoms of the Communist Party, and its power to regulate the same freedoms of any other type of political or ideological association. For the purposes of argument, we admitted the premises of the balancing test as articulated by Mr. Justice Frankfurter in *Communist Party* v. *Subversive Activities Control Board*. We argued that whatever conclusion the Court came to in balancing the First Amendment against the danger of forcible overthrow by a foreign totalitarian power, the First Amendment must prevail where the abridgment side of the scale carried any less weight.

Amicus does not agree, however, that the balancing test is defensible as a judicial means of determining whether speech or association may be suppressed. Our briefs *amicus curiae* in both *Communist Party* cases (351 U. S. 115 and 367 U. S. 1) argued the unconstitutionality of the Act as applied to the Communist Party. We reiterate the views expressed there and respectfully suggest that it is

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islation would be constitutional. . . . [T]he Communist Party is something different in fact from any other substantial party we have known, and hence may constitutionally be treated as something different in law."

never inappropriate for this Court to reconsider any of its decisions which abridge First Amendment freedoms.

It is our view that the Subversive Activities Control Act is incompatible with at least three constitutional principles which have been established by this Court in cases involving the First Amendment.

1. ***The statute is not narrowly drawn.***

The statute is not carefully and "narrowly drawn to prevent the supposed evil . . . "[57] In the context of sedition, a statutory restriction on freedom of expression cannot be upheld "if it does not deal with a willful attempt to obstruct a described and defined activity of the government."[58] And in any First Amendment case, it is only a "narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society."[59]

There has been no showing that narrower and more direct means, whose effects will be felt closer to the claimed point of danger, are inadequate to cope with any actual threat of forcible overthrow. There is an arsenal of statutes available to cope with such overt acts as insurrection, sabotage and espionage, as well as conspiracies and attempts to commit those substantive crimes. Even the Smith Act (18 U. S. C. Sec. 2385)—to adopt for the moment the vocabulary of sedition and seditious conspiracy—is a more direct and narrowly drawn means for dealing with the alleged substantive evil.

Assuming Congress has constitutional authority to legislate in the area of Communist beliefs and associations,

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[57] *Cantwell* v. *Connecticut*, 310 U. S. 296, 308 (1940).

[58] *Herndon* v. *Lowry*, 301 U. S. 242, 255-56 (1937).

[59] *Burstyn* v. *Wilson*, 343 U. S. 495, 505 (1952).

surely a statute might have been drawn which would have isolated and defined the locus of proscribed activity with some greater precision. See *Lovell* v. *Griffin*, 303 U. S. 404 (1938); *Schneider* v. *State*, 308 U. S. 147 (1939); *Carlson* v. *California*, 310 U. S. 106 (1940). The rule that restrictions on expression and association must be narrowly drawn, calls for a scalpel not a broadsword.

2. *The statute offends the clear and present danger test.*

It should not be forgotten that the clear and present danger test was first articulated by Mr. Justice Holmes, not in dissent, but speaking for the Court in *Schenck* v. *United States*, 249 U. S. 47 (1919). *Schenck* affirmed a conviction under the Espionage Act of 1917 for publishing and circulating to men called for military service, leaflets which called for insubordination and obstruction of recruitment and enlistment during World War I. The Court held that the statute and conviction were constitutionally justified only because of war conditions. Mr. Justice Holmes then wrote:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right." 249 U. S. at 52.

The same kind of activity held criminal in *Schenck*, but under less bellicose conditions, was held protected against abridgment under the clear and present danger test in

Taylor v. *Mississippi*, 319 U. S. 583 (1943). Reversing a conviction of a religious opponent to World War II, Mr. Justice Roberts wrote for a unanimous court:

> "As applied to the appellants [the statute] punishes them although what they communicated is not claimed or shown to have been done with an evil or sinister purpose, to have advocated or incited subversive action against the nation or state, or have threatened any clear or present danger to our institutions or our government. What these appellants communicated were their beliefs and opinions concerning domestic measures and trends in national and world affairs." 319 U. S. at 589, 590.

And in *Herndon* v. *Lowry*, 301 U. S. 242 (1937), the Court expressly applied the clear and present danger test to reverse the conviction, under a Georgia incitement to insurrection statute, of an organizer for the Communist Party who was admittedly advocating among Negroes the then program of the Party for the establishment of a Black Belt Republic. Mr. Justice Roberts wrote for the Court:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterance of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered." 301 U. S. at 528.[60]

Amicus contends that under the clear and present danger test not even the Communist-action organization registra-

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[60] More recently, the Court has applied the clear and present danger test to reverse a contempt conviction founded upon criticism of judicial conduct. *Wood* v. *Georgia*, 370 U. S. 375 (1962).

tion provisions of the Control Act can survive; *a fortiori*, the Communist-front registration provisions must be declared unconstitutional.

3. *The statute runs afoul of* DeJonge v. Oregon.

More than that, it is our contention that some statutory abridgements of the First Amendment are so exceptional that neither the balancing test nor the clear and present danger test need be invoked to strike them down. *DeJonge* v. *Oregon*, 299 U. S. 353 (1937), which held the Oregon criminal syndicalism statute unconstitutional on its face, was such a case. Speaking for a unanimous Court, Mr. Chief Justice Hughes said:

> "The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects." 299 U. S. at 362.

The registration requirements of the Act stand in direct opposition to the First Amendment as declared in *DeJonge*. The necessity for the expression of ideas, the fact that their reasonableness, their logic, their consistency, their capacity to persuade others, their ability to respond to public problems; the awareness that the impact upon these ideas of other ideas will determine their fate, the confidence that truth and reason will ultimately prevail in the marketplace, are contemptuously disregarded by the rationale of the Act. All that the Act is concerned with is whether the speaker can be branded a Communist. The result is a stifling of communication and the suffocation of the free flow of ideas which are vital to the functioning of democratic government.

In the quarter century since *DeJonge*, there have been considerable changes in all aspects of American life. The world has contracted; many new problems, both foreign and domestic, confront our nation; many old problems remain with us. The value of and the necessity for maximizing freedom of speech, association and assembly, is even greater today than it was twenty-five years ago.

This Court has never repudiated either the philosophy or the decision of *DeJonge*. Although in recent years it has been cited more frequently in dissents than in majority opinions, it still authoritatively states what the First Amendment means. The essence of *DeJonge* is that while there may be some circumstances in which the government may have a legitimate concern over *what* is said, it is commanded by the First Amendment to be wholly disinterested in who says it.

There is no occasion more appropriate than is presented by this case for a reaffirmation of the doctrine of *DeJonge*. With the proscription of Communist-action organizations, the constitutionally dubious abridgement of speech has gone far enough—in *Amicus'* view, it has gone much too far. A decision which upholds the constitutionality of branding organizations as Communist-fronts will damage our free institutions so severely, it will take decades to recover from the blow. On the other hand, a decision which announces to Congress, to the Executive Branch of government, and to the public opinion of the country and the world, that the erosion has ended, will recapture the first principles of our democratic institutions.

POINT III

Sections 3(4) and 13(f) of the Subversive Activities Control Act, are so vague and uncertain, that they violate the due process clause of the Fifth Amendment to the Constitution.

Section 3(4) of the Act provides:

> The term "Communist-front organization" means any organization in the United States (other than a Communist-action organization as defined in paragraph (3) of this section) which (A) is substantially directed, dominated or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 2 of this title.

Section 13(f) of the Act provides:

> "In determining whether any organization is a 'Communist-front organization', the Board shall take into consideration—
>
> (1) the extent to which persons who are active in its management, direction or supervision whether or not holding office therein, are active in the management, direction or supervision of, or as representatives of, any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2 of this title; and
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> (2) the extent to which its support, financial or otherwise, is derived from any Communist-action organization, Communist foreign government, or the

world Communist movement referred to in section 2 of this title; and

(3) the extent to which its funds, resources, or personnel are used to further or promote the objectives of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2 of this title; and

(4) the extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2 of this title.

The terms included in these sections are nowhere defined in the Act. Standing alone, they encompass such a limitless range of acts and omissions, that they provide no clearly ascertainable standard. They must therefore fall for violating the due process clause of the fifth amendment. *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961); *United States* v. *Cardiff*, 344 U. S. 174 (1952); *Musser* v. *Utah*, 333 U. S. 45 (1948); *Winters* v. *New York*, 333 U. S. 507 (1948); *Kraus & Bros.* v. *United States*, 327 U. S. 614 (1946); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81 (1921); *International Harvester Co.* v. *Kentucky*, 234 U. S. 216 (1914).[61]

[61] The argument that the provisions of the Act dealing with Communist-action organizations were unconstitutionally vague received only passing treatment when the statute was considered by the Court of Appeals. *Communist Party* v. *Subversive Activities Control Board*, 223 F. 2d 531, 559. When the *Communist Party* case was before the Supreme Court, 367 U. S. 1, although Mr. Justice Frankfurter referred to this argument at pages 71 and 82,

With characteristic succinctness, Mr. Justice Holmes described the essential vice of a vague statute. It requires one "to divine prophetically what the reaction of only partially determinate facts would be * * *," thereby seeking "to exact gifts that mankind does not possess." *International Harvester Co.* v. *Kentucky, supra* at 223-224. In other words, due process requires "fair warning". *Bouie* v. *City of Columbia, supra,* at 351.

Most directly in point here are *Cramp* v. *Board of Public Instruction, supra,* and *Baggett* v. *Bullitt, supra. Cramp* struck down as unconstitutionally vague a Florida loyalty-oath statute whose provisions were remarkably similar to those in the Act now before this court. The Florida statute required state employees to acknowledge under oath that they had not and would not lend "aid, support, advice, counsel or influence to the Communist Party."

Writing for a unanimous Court, Mr. Justice Stewart said:

> "The provision of the oath here in question, it is to be noted, says nothing of advocacy of violent overthrow of state or federal government. It says nothing of membership or affiliation with the Communist Party, past or present. The provision is completely lacking in these or any other terms susceptible of objective measurement. Those who take this oath must swear rather that they have not in the unending past ever knowingly lent their 'aid', or 'support', or 'advice', or 'counsel', or 'influence' to the Communist Party.

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the opinion of the Court concludes at page 115 without any discussion of it.

The only mention of vagueness by the Court of Appeals in the "Front" cases was the observation in *National Council,* that "... we do not pass upon ... other constitutional points pressed upon us ... such as questions of vagueness of the statute. ..." 322 F. 2d at 392.

> What do these phrases mean? In the not too distant past Communist Party candidates appeared regularly and legally on the ballot in many state and local elections. Elsewhere the Communist Party has on occasion endorsed or supported candidates nominated by others. Could one who had ever cast his vote for such a candidate safely subscribe to this legislative oath? Could a lawyer who had ever represented the Communist Party or its members swear with either confidence or honesty that he had never knowingly lent his 'counsel' to the Party? Could a journalist who had ever defended the constitutional rights of the Communist Party conscientiously take an oath that he had never lent the Party his 'support?' Indeed could anyone honestly subscribe to this oath who had ever supported any cause with contemporaneous knowledge that the Communist Party also supported it?" 368 U. S. at 286.

Mr. Justice Stewart's analysis is wholly applicable to the language of Sections 3(4) and 13(f) of the Act. The language contained in those sections, to establish whether an organization is a Communist-front, includes "giving aid and support to", "the extent to which its support, financial or otherwise, is derived from", "the extent to which its funds, resources and personnel are used to further or promote the objectives of", and "the extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of" any Communist-action organization, Communist foreign government, or the world Communist movement.

The words "aid" and "support," are no more "susceptible of objective measurement" when they appear in the Act than when they appeared in the Florida statute. The same hypothetical journalist pictured by Mr. Justice Stewart as a person who could not conscientiously take the Florida

oath that he had never lent the Party his "support" if he had so much as "ever defended the constitutional rights of the Communist Party" is subjected to a standard no less taxing if, when he writes an article defending the constitutional rights of Communists, his publication may be held to be lending its "support" to the Party.

Even more vague is the phrase "to further and promote the objectives of any Communist-action organization." If Mr. Justice Stewart's hypothetical lawyer might have some difficulty in deciding whether he ever gave "counsel" to the Communist Party, how much greater is the dilemma, for example, of a bar association, or a civil liberties organization, lest its "funds, resources or personnel" be found to have been "used to further or promote the objectives" of a Communist organization? Indeed, in writing, printing and filing a brief *amicus curiae* in *Communist Party* v. *Subversive Activities Control Board*,[62] did *Amicus* use its "funds, resources or personnel" to "further or promote the objectives of a Communist-action organization?"

In *Baggett* v. *Bullitt, supra,* this Court declared unconstitutionally vague a State of Washington loyalty oath which had many of the same obnoxious characteristics as that in *Cramp*.[63] It was of no consequence that the Washington statute had been construed to require *scienter*.

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[62] 367 U. S. 1.

[63] "The questions put by the Court in Cramp may with equal force be asked here. Does the statute reach endorsement or support for Communist candidates for office? Does it reach a lawyer who represents the Communist Party or its members or a journalist who defends constitutional rights of the Communist Party or its members or anyone who supports any cause which is likewise supported by Communists or the Communist Party? The susceptibility of the statutory language to require foreswearing of an undefined variety of "guiltless knowing behavior" is what the Court condemned in Cramp. This statute, like the one at issue in Cramp, is unconstitutionally vague." *Baggett* v. *Bullitt, supra.*

"But what is it that the Washington professor must 'know'? Must he know that his aid or teaching will be used by another and that the person aided has the requisite guilty intent or is it sufficient that he know that his aid or teaching would or may be useful to others in the commission of acts intended to overthrow the Government? Is it subversive activity, for example, to attend and participate in international conventions of mathematicians and exchange views with scholars from Communist countries? What about the editor of a scholarly journal who analyzes and criticizes the manuscripts of Communist scholars submitted for publication? Is selecting outstanding scholars from Communist countries as visiting professors and advising, teaching, or consulting with them at the University of Washington a subversive activity if such scholars are known to be Communists, or regardless of their affiliations, regularly teach students who are members of the Communist Party, which by statutory definition is subversive and dedicated to the overthrow of the Government?" [64]

This Court in *Cramp*, particularly emphasizing that definiteness and certainty are of special importance in statutes which have the effect of limiting freedom of expression, said that "The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." 368 U. S. at 287-288.[65]

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[64] *Id.* at ——.

[65] See *Herndon* v. *Lowry*, *supra*, at 263-264, where Mr. Justice Roberts wrote: "The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change in government if a jury can be persuaded that he ought

The special concern in vagueness decisions with possible inhibitions of freedom of expression reflects the preferred position of constitutional liberties protected by the Bill of Rights.[66] The reason is wise and practical. If any vague statute, criminal or civil, is capable of producing great injustice because it fails "to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused",[67] how much more dangerous is a statute whose vagueness does all of this harm, and at the same time represses free speech?[68]

> "We are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms. . . . Free speech may not be so inhibited." *Baggett, supra.*

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to have foreseen his words would have some effect in the future conduct of others." In *Winters* v. *New York*, 333 U. S. 507, 517, the Supreme Court said "This Court goes far to uphold state statutes that deal with offenses, difficult to define when they are not entwined with limitations on full expression. We have the same attitude toward federal statutes."

[66] *United States* v. *Carolene Products*, 304 U. S. 144, 152 n. 4. See *Kovacs* v. *Cooper*, 336 U. S. 77; *Thomas* v. *Collins*, 323 U. S. 516; *Thornhill* v. *Alabama*, 310 U. S. 88.

[67] *Musser* v. *Utah*, 333 U. S. 95, 97.

[68] "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face . . . is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." *Stromberg* v. *California*, 283 U. S. 359, 369.

"It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches that prosecutors too are human."[69] Precisely because of the vague criteria and definition, the label of Communist-front may be affixed all to readily. This case falls squarely within the compass of *Cramp* v. *Board of Public Instruction*, and *Baggett* v. *Bullitt*, and this court should so hold.

CONCLUSION

For the foregoing reasons, the registration provisions the Subversive Activities Control Act should be declared unconstitutional and the orders of the Board set aside.

Respectfully submitted,

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[69] *Cramp*, supra at 286-287. Administrative officials, without the same due process restraints as are generally applicable to prosecutors, are probably even more subject to human frailties.